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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

September 30, 1993

William F. Caton, Secretary
Federal Communications Commission
Washington, D.C. 20554

OUR FILE NO.
1158-101-63

RE: MM Docket No. 93-91
RM Nos. 8197, 8279
Berlin *et al.*, Wisconsin

SUBJECT: OPPOSITION OF MARKESAN BROADCASTING COMPANY TO
MOTION TO STRIKE FILED BY KINGSLEY H. MURPHY, JR.

Dear Mr. Caton:

On behalf of Mark J. Kastein d/b/a Markesan Broadcasting Company, I transmit herewith the original and four copies of its Opposition Of Markesan Broadcasting Company To Motion To Strike Filed By Kingsly H. Murphy, Jr. in the above-referenced proceeding.

Any questions may be communicated directly to this office.

Yours very truly,


John Wells King

JWK/jb
Enclosures

cc: Michael C. Ruger, Chief
Ms. Kathleen Scheuerle
Richard J. Hayes, Jr., Esquire
Jerold L. Jacobs, Esquire
Julie A. Blaser

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Before The
Federal Communications Commission

Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In The Matter Of

Docket No. 93-91

Amendment of Section 73.202(b),
 Table of Allotments,
 FM Broadcast Stations
 (Berlin, De Forest, Wautoma, and
 Markesan, Wisconsin

RM Nos. 8197, 8279

TO: Chief, Allocations Branch
 Policy and Rules Division
 Mass Media Bureau

OPPOSITION OF MARKESAN BROADCASTING COMPANY
 TO MOTION TO STRIKE FILED BY KINGSLEY H. MURPHY, JR.

On September 16, 1993, Kingsley H. Murphy, Jr. ("Murphy"), through counsel, filed with the Commission a document entitled "Motion to Strike Portions of Reply Comments of Markesan Broadcasting Company Because of Gross Errors and Abuse of Process and Motion for Leave to File" (referred to herein as the "Motion"), directed to the July 15, 1993, Reply Comments filed herein by Mark J. Kastein, d/b/a Markesan Broadcasting Company ("Kastein"). Kastein, by his attorney, herewith opposes that Motion, by stating as follows:

The Motion Fails to Establish Good Cause

Recognizing that the Commission's Rules limit the documents to be filed in a rule making proceeding to comments and reply comments, the Motion contains a request that Murphy be granted leave

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to file its unusually tardy, unauthorized pleading. However, the Motion does nothing to establish good cause for granting the request. It merely recites the perfunctory "for good cause shown." Murphy has been active in this proceeding from the outset, and has already stated, or timely could have stated, all of the matters raised in the Motion. For this reason alone, the Motion should be disregarded.

**Kastein's Proposal Properly Establishes
The Superior Need For Service At Markesan**

If the Commission determines to place the Motion in the record of this proceeding, then Kastein offers the following brief comments in response.

Murphy follows in the tracks of the DeForest proponent¹ by submitting his own engineering statement in response to the superior service claims that Kastein made in his July 15, 1993, Reply Comments. As noted in response to DeForest, the engineering showing accompanying the Reply Comments defined areas that would be served by a Markesan facility which are presently without any 3.16 mV/m service whatsoever. This was the frame of reference for Kastein's observations regarding white areas that would be served.

There is no need to visit further the contentions made by Murphy regarding existing service to Markesan. They are addressed in the engineering statement of Kastein's communications consultant, Lyle

¹ DeForest Broadcasting Company filed a motion to strike Kastein's July 15, 1993, submission on August 30, 1993.

Robert Evans, attached to its Opposition to the DeForest motion to strike.

Kastein's Proposal Was Substantially Complete

Murphy maintains that Kastein's inclusion of Section 307(b) information in his July 15, 1993, filing was improper; that it should have been included in his original proposal; and that his original proposal was, accordingly, incomplete.

Kastein's proposal was not incomplete. It contained the minimum required of a petitioner: specific channel and class, specific transmitter site coordinates, and engineering studies that indicate the station would meet minimum separation and city grade coverage requirements. *Provincetown MA, et al.*, 8 FCC Rcd 19, 20 ¶ 10 (MMB 1992) (cited by Murphy.)

Once the Commission accepted Kastein's counterproposal, he was no less entitled to comment upon it than any other interested party, and to supply information that will assist the Commission in resolving the conflicting proposals before it.

Murphy claims that Kastein's Reply Comments constitute a late proffer of evidence which was "post-filing." Murphy confuses the rulemaking process with the application process. The rules and procedures governing the filing and processing of, and hearings on, applications, are inapplicable to rulemaking proceedings. "Evidence," in the trial sense of the word, is not formally proffered or adduced in

rulemakings. Nor is there a "post-filing" restriction placed upon an interested party.

Parties to a rulemaking may file comments and reply comments. That is precisely what Kastein filed. There is no basis to strike any portion of Kastein's Reply Comments.

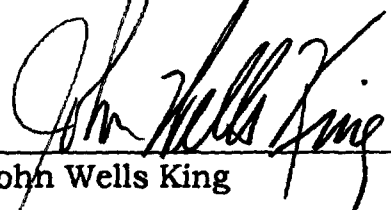
Murphy's Real Party Musings Are Sheer Speculation

In postulating an abuse of process case against Kastein, Murphy "observes," "reasons," and "maintains" his way to a sheerly speculative conclusion. The record of this proceeding contains the Declaration of Mark J. Kastein that addresses and fully responds to such an attack upon his *bona fides*.

Accordingly, the Commission should disregard the Motion To Strike.

Respectfully submitted,

MARK J. KASTEIN, D/B/A
MARKESAN BROADCASTING COMPANY

By 
John Wells King

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September 30, 1993

CERTIFICATE OF SERVICE

The undersigned, an employee of Haley, Bader & Potts, hereby certifies that the foregoing document was mailed this date by First Class U.S. Mail, postage prepaid, or was hand-delivered*, to the following:

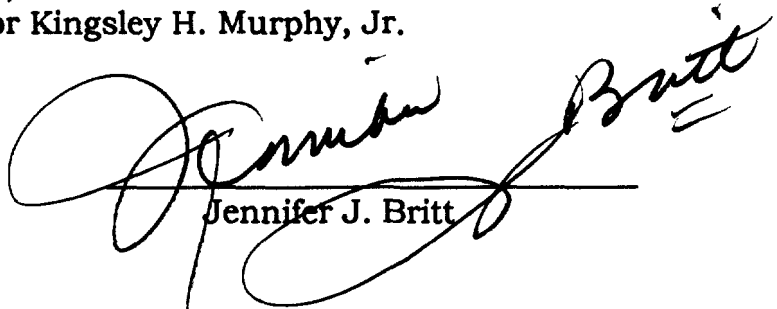
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Jennifer J. Britt

September 30, 1993